Supreme Court, U.S.
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No. 92-64

In the Supreme Court of the United States

OCTOBER TERM, 1992

LARRY A. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether it violated the Federal Rules of Evidence or the Confrontation Clause of the Sixth Amendment to admit the grand jury testimony of a deceased witness at petitioner's trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not reported, but the judgment is noted at 956 F.2d 1163 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1992. On May 22, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to July 9, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of making a false statement to a grand jury, in violation of 18 U.S.C. 1623, and of obstructing justice, in violation of 18 U.S.C. 1503.[1] He was sentenced to 37 months' imprisonment, to be followed by two years' supervised release, and was fined $45,000. The court of appeals affirmed. Pet. App. 1a-6a; Gov't C.A. Br. 3.

1. Petitioner was a real estate broker and former president of the West Virginia State Senate. In September 1989, petitioner pleaded guilty pursuant to a plea agreement to a one-count information charging him with violating the Hobbs Act, 18 U.S.C. 1951 (b)(2). Petitioner's plea agreement required him to cooperate with investigative authorities and to testify truthfully before a federal grand jury. In November and December 1989, petitioner testified before the grand jury that, other than the $10,000 that formed the basis for his guilty plea, he had not received any income that he had failed to report on his income tax returns. In particular, he stated that he had reported all of the income he had received from nursing home interests. The grand jury also asked petitioner where he had obtained money that he used to repay a number of business debts; petitioner said he had obtained that money either from the sale of bank stock or from income on which he had already paid

[1] He was acquitted on one count of committing perjury (18 U.S.C. 1621) and one count of obstructing justice (18 U.S.C. 1503). In addition, prior to trial the district court dismissed counts charging petitioner with filing a false income tax return (26 U.S.C. 7206(1)), and with conspiracy to impede the IRS (18 U.S.C. 371).

taxes. Petitioner gave the same information to an IRS agent. Pet. App. 2a-3a; Gov't C.A. Br. 4-5; C.A. App. 203, 339-348.

Petitioner's testimony that he had correctly reported his taxable income, including income from nursing home interests, was false. Other evidence showed that petitioner had unreported income that he had concealed by routing it through a corporation operated by one of his associates. Pet. App. 2a-3a.

In January and February 1990, Cecil Nichols, co-owner of Continental Health Care (CHC), a nursing home construction firm, testified before a different grand jury. Prior to his second appearance, he was granted immunity. C.A. App. 70, 102-103. Nichols testified that CHC had given petitioner a $75,000 check in December 1983 for some of his work in locating suitable sites in West Virginia for the construction of nursing homes. According to Nichols, petitioner returned the $75,000 to CHC in 1985 and requested CHC to make out a new $75,000 check to Fricks, Inc., a business operated by petitioner's business associate. Petitioner did not report the $75,000 on his income tax returns. Pet. App. 2a-3a; Gov't C.A. Br. 5-6, 15; C.A. App. 218. In June 1990, petitioner was indicted on the instant false statement and obstruction of justice charges. Pet. App. 3a.

At petitioner's trial, Donald Tate, the owner of Fricks, confirmed that he had "laundered" money through a Fricks account for petitioner. Tate explained that, at petitioner's request, he set up an account through which petitioner could launder his funds. Tate said that the account was used only for that purpose; Fricks had separate accounts through which it conducted its own business. Gov't C.A. Br. 7-8.

Prior to petitioner's trial, Nichols died. The government moved to admit his grand jury testimony under the residual exception to the hearsay rule, Fed. R. Evid. 804(b)(5).[2] Petitioner argued that the admission of that evidence would violate the hearsay rule and his rights under the Confrontation Clause of the Sixth Amendment. The trial court rejected those claims and admitted the testimony. Pet. App. 3a.

2. On appeal, petitioner renewed his claim that the trial court erred in admitting Nichols' grand jury testimony. Relying on *United States* v. *Ellis*, 951 F.2d 580 (4th Cir.), cert. denied, 112 S. Ct. 3030 (1992), the court of appeals applied a two-part test to determine whether the district court had correctly admitted Nichols' statements. Under that test, the government first had to show that the witness was unavailable; since Nichols was dead, that requirement was met. Pet. App. 4a. The second part of the test required the government to show that the statements were reliable either because they fell within a firmly rooted exception to the hearsay rule, or because they had sufficient guarantees of trustworthiness. *Ibid.* Because Fed. R. Evid. 804(b)(5) is not a traditional hearsay exception, the court of appeals considered whether Nichols' testimony had sufficient guarantees

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[2] Fed. R. Evid. 804(b)(5) provides that a hearsay statement of an unavailable declarant, not specifically covered by another exception in Rule 804, may be admitted if the statement has "equivalent circumstantial guarantees of trustworthiness" and the trial court determines that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

of trustworthiness. Pet. App. 4a n.3. The court concluded that it did. The court rested that conclusion on several factors, including that Nichols had testified pursuant to an immunity agreement that required him to give truthful testimony; that he had had the opportunity to consult with his counsel during his testimony; that he necessarily understood that the information he gave would be subject to further investigation; and that he would be exposed to a perjury prosecution if he provided false testimony. *Id.* at 5a.

ARGUMENT

1. Petitioner contends (Pet. 13-16) that the admission of Nichols' grand jury testimony pursuant to a residual hearsay exception, Fed. R. Evid. 804(b)(5), was erroneous. He argues that when former testimony fails to satisfy Fed. R. Evid. 804(b)(1), which creates a hearsay exception for former testimony of an unavailable witness, it can never be admitted under the residual exception. That contention lacks merit and does not warrant this Court's review.

Rule 804(b)(5) authorizes the admission of the hearsay statement of an unavailable witness when the statement is "not specifically covered" by another Rule 804(b) exception, but has "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 804(b)(5). The residual exception constitutes a generally applicable basis for the admission of an out-of-court statement of an unavailable witness when the trial court finds, on a case-by-case basis, that the statement is sufficiently reliable and meets the other requirements of the Rule. Nothing in the text of the Rule indicates that if another exception might apply,

but is not satisfied on the particular facts, the residual exception is unavailable.[3]

The courts of appeals have recognized that Rule 804(b)(5) applies to former testimony that fails to satisfy the requirements of Rule 804(b)(1). As the First Circuit has explained, there is no basis for concluding that "the 'potential' availability of one kind of hearsay exception automatically rules out the use of another. After all, normally, hearsay is admissible if it satisfies any one exception." *United States* v. *Doulon*, 909 F.2d 650, 654 (1990) (admitting grand jury testimony pursuant to Rule 804(b)(5)); *United States* v. *Furst*, 886 F.2d 558, 573 (3d Cir. 1989) (Rule 804(b)(5) "is not limited * * * as to types of evidence not addressed in the other exceptions"), cert. denied, 493 U.S. 1062 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1354-1355 (7th Cir. 1989) (admitting grand jury testimony under residual exception); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.) (same), cert. denied, 488 U.S. 843 (1988); *United States* v. *Carlson*, 547 F.2d 1346, 1353-1355 (8th Cir. 1976) (same), cert. denied, 431 U.S. 914 (1977); cf. *United States* v. *Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979) (statement that failed to satisfy requirements of

[3] The legislative history supports the view that former testimony may be admitted under the residual exception in particular cases. The Senate Committee on the Judiciary justified its inclusion of a residual hearsay exception in part on the basis that "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include." S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974). The residual exception could not function as such a safety valve if courts were precluded from admitting a statement under a residual exception whenever the statement was arguably covered by another exception but failed to satisfy its requirements.

business record exception was admissible under residual exception).

Petitioner errs in contending (Pet. 14-15) that *United States* v. *Thomas*, 919 F.2d 495, 498 (8th Cir. 1990), cert. denied, 111 S. Ct. 2837 (1991), conflicts with those cases. In *Thomas*, the court found that a particular statement failed to satisfy the requirements of the exception in Rule 804(b)(3) for statements against interest, and suggested that, because the residual exception applies only when a statement is not "covered" by another exception, "[i]t would appear" that the residual exception did "not come into play." 919 F.2d at 498.[4] The court held, however, that the proffered statement was inadmissible under the residual exception in any event, because it lacked indications of trustworthiness. *Ibid.* Accordingly, *Thomas* did not reject the potential applicability of Rule 804(b)(5) to trustworthy hearsay.[5]

Nor does the decision in this case conflict with *United States* v. *Salerno*, 112 S. Ct. 2503 (1992). Pet. 13-14, 16. That case did not involve Rule 804(b)(5). Rather, it presented the issue of whether, when a witness asserts his Fifth Amendment privilege at

[4] That reading of Rule 804(b)(5) is incorrect. A statement is "covered" by another exception only if the statement satisfies all of the requirements of that exception. "If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement 'covered by [one] of the foregoing exceptions' within the meaning of Rule 804(b)(5)." *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990).

[5] The absence of any conflict is underscored by the First Circuit's observation in *United States* v. *Donlon*, 909 F.2d at 654, that "we shall follow all other circuits that have considered this matter and hold that prior grand jury testimony falls within the category of hearsay to which the exception (5), the residual exception, *potentially* applies."

trial, a court may admit the grand jury testimony of that witness against the government pursuant to Fed. R. Evid. 804(b)(1), whether or not the government had a similar motive to cross-examine the witness when the grand jury testimony was given. Applying the requirement in Rule 804(b)(1) that former testimony may be admitted under that exception only "if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," the Court held that a defendant has "no right to introduce * * * [a grand jury witness's] former testimony under Rule 804(b)(1) without showing a 'similar motive.'" 112 S. Ct. at 2507. The Court remanded for the court of appeals to consider whether the government had such a "similar motive" in that case. *Id.* at 2508-2509. *Salerno* holds only that when former testimony is admitted under Rule 804(b)(1), a court may not "ignore" a specific requirement of that provision, 112 S. Ct. at 2508; it does not hold that the residual exception in Rule 804(b)(5) is inapplicable to former testimony that does not satisfy Rule 804(b)(1).

2. Petitioner also contends (Pet. 16-27) that the court of appeals erred in considering, as factors supporting the reliability of Nichols' testimony, that it was given under a grant of immunity and that he was under oath before a grand jury. According to petitioner, the circuits are in conflict over whether those factors support or undercut the reliability of an unavailable declarant's hearsay statements.

Both Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment require an inquiry into the guarantees of trustworthiness that surround a hearsay statement before the trial court may admit it. Fed. R. Evid. 804(b)(5); *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). Where, as here, the hearsay statement

does not fall into a recognized hearsay exception, it must have "particularized guarantees of trustworthiness" as a result of the circumstances in which the statement was made. 110 S. Ct. at 3148-3150. Although the Court held in *Wright* that corroborating evidence is not part of the circumstances to be considered, the Court "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause," recognizing that trial courts "have considerable leeway in their consideration of appropriate factors." *Id.* at 3150.

The courts that have considered whether the grand jury testimony of an immunized witness is admissible have properly focused on the particular facts of each case, without applying a "mechanical test." In this case, the court of appeals found that the particular circumstances surrounding Nichols' grand jury testimony gave it "indicia of trustworthiness sufficient for purposes of the Confrontation Clause". Pet. App. 5a. The court explained that Nichols was required by his immunity agreement to give truthful testimony; that his agreement with the government was reached with the advice of counsel, who was available to him throughout his testimony; that Nichols was necessarily aware that his testimony would be subject to investigation by the prosecutor and that his immunity could be revoked if he testified falsely;[6] and that, because his grand jury testimony was given under oath, Nichols would be exposed to a perjury prosecution if he testified falsely. *Ibid.*

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[6] The immunity agreement stated that "[i]f either the United States or Mr. Nichols violates the terms of this agreement, the other party will have the right to void this agreement." C.A. App. 103.

Other courts have applied a similar multi-factor analysis in admitting grand jury testimony (as well as other out-of-court statements), after close examination of the particular facts. See, *e.g.*, *United States* v. *Panzardi-Lespier*, 918 F.2d 313, 316-317 (1st Cir. 1990); *United States* v. *Workman*, 860 F.2d 140, 144-145 (4th Cir. 1988), cert. denied, 489 U.S. 1078 (1989); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.), cert. denied, 488 U.S. 843 (1988); *United States* v. *Doerr*, 886 F.2d 944, 955-958 (7th Cir. 1989); *United States* v. *Carlson*, 547 F.2d 1346, 1352-1360 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States* v. *Marchini*, 797 F.2d 759, 764-765 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987).[7]

In particular cases, some courts have viewed a witness's entry into an immunity agreement before testifying as a factor cutting against the testimony's reliability.[8] Other courts have found an immunity

[7] Neither this case nor others cited by petitioner (Pet. 23) have viewed the grand jury setting as necessarily supporting a statement's reliability. For example, the portion of *United States* v. *McCall*, 740 F.2d 1331, 1342 (4th Cir. 1984), cited by petitioner (Pet. 23) represented the opinion of only one judge, not the opinion of the court. See 740 F.2d at 1334. In *United States* v. *Carlson*, *supra*, and *United States* v. *Doulon*, *supra*, the grand jury setting was but one of many factors that the courts considered.

[8] See, *e.g.*, *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985) (reversing use of a deposition from a civil case when witness had incentive to protect his financial interest; court noted that immunized testimony could be self-serving); *United States* v. *Gomez-Lemos*, 939 F.2d 326, 330, 333 (6th Cir. 1991) (reversing admission of co-conspirators' grand jury testimony, after witnesses asserted Fifth Amendment privilege at trial; court observed that giving testimony under oath did not guarantee the trustworthiness of the statements, and that a plea agreement might imply that the witness was currying favor with the prosecutor); *United States* v. *Bailey*, 581 F.2d

agreement or the grand jury setting to add little to the reliability of hearsay statements.[9] Still other courts have noted, in passing, the fact that a witness did not have immunity as a circumstance supporting reliability.[10] Those cases do not conflict with this case. No court has established a per se rule that a statement's reliability can never be enhanced by the fact that the statement was given under oath, before a grand jury, or pursuant to an immunity agreement. The particular facts of each case have been paramount.[11] Indeed, even those courts that have suggested that an immunity arrangement may detract from the reliability of a witness's statements have not found that factor alone to bar the admission of the testimony.[12]

341, 350 (3d Cir. 1978) (holding that statement was inadmissible because of lack of reliability, noting that statement was made during plea negotiations and was not made under oath).

[9] See *United States* v. *Fernandez*, 892 F.2d 976, 983 (11th Cir. 1989) (grant of immunity did not add to testimony's reliability), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Snyder*, 872 F.2d at 1355 (grand jury setting "adds little" to testimony's reliability).

[10] See, *e.g.*, *United States* v. *Donlon*, 909 F.2d at 654 (noting absence of immunity); *United States* v. *Vernor*, 902 F.2d 1182, 1188 (5th Cir.) (discussing a variety of factors including absence of plea agreement or promises from prosecutor), cert. denied, 111 S. Ct. 301 (1990); *United States* v. *Zannino*, 895 F.2d 1, 7 (1st Cir.) (noting absence of immunity), cert. denied, 494 U.S. 1082 (1990).

[11] See *United States* v. *Gonzalez*, 559 F.2d 1271, 1274 (5th Cir. 1977) (Pet. 24) (holding grand jury testimony inadmissible when prosecutor repeatedly threatened witness with contempt; distinguishing *United States* v. *Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977), in which grand jury testimony was admitted).

[12] See *United States* v. *Snyder*, 872 F.2d at 1356 (affirming admission of grand jury testimony; arrangement between

The decisions in this area conform to the rule, recently reaffirmed in *United States* v. *Kladouris*, 964 F.2d 658, 663 (7th Cir. 1992), that any list of relevant factors under Rule 804(b)(5) is neither absolute nor exhaustive, and that each case must be decided on its own particular facts. A single factor, such as an immunity agreement, may take on a different coloration depending on the surrounding circumstances. See *United States* v. *Snyder*, 872 F.2d at 1356 ("[e]very case must be analyzed on its own facts"; that the government had agreed to assist witness was disclosed to jury, thereby mitigating concerns about the impact of that assistance on the statement's reliability).

In this case, Nichols entered into an immunity arrangement and testified before the grand jury with counsel, who could be expected to act as a check against perjury or prosecutorial influence, available to him. Moreover, Nichols had to realize that the government would investigate his statements; if they were false, he could be subjected to prosecution and imprisonment. Finally, Nichols did not repudiate his statements or subsequently assert a Fifth Amendment privilege and refuse to testify. Accordingly, the court of appeals reasonably concluded that Nichols' grand jury testimony bore indicia of reliability warranting its admission. That other courts, under different circumstances, have found immunity agreements to detract from a statement's reliability does

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government and witness was revealed to jury); *United States* v. *Thevis*, 665 F.2d 616, 629 (5th Cir.) (affirming admission of grand jury testimony while observing in dictum that immunity agreement might encourage a witness to embellish his testimony), cert. denied, 456 U.S. 1008 (1982).

not create a conflict warranting this Court's review.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992

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[13] Petitioner also suggests (Pet. 27-29) that review is warranted to examine the relationship between the "particularized guarantees of trustworthiness" required for the Confrontation Clause and for Rule 804(b)(5). As this Court and others have recognized, the same considerations are relevant in both contexts. See *Idaho* v. *Wright*, 110 S. Ct. at 3150; *United States* v. *Zannino*, 895 F.2d at 7 (leaving open whether tests are always the same). There is no conflict in the circuits on this issue, and petitioner does not suggest any other reason that would justify its review by this Court.